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DECISION

20498
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548P.L. 2
Mitchell

FILE: B-205072

DATE: January 6, 1982

MATTER OF: Friend Manufacturing Corporation

DIGEST:

1. Protest is sustained where agency concedes it erred in not waiving first article testing requirement for protester.
2. Protest concerning small business size status is not for consideration by GAO since exclusive authority is statutorily vested with Small Business Administration.

Friend Manufacturing Corporation submitted a bid under solicitation No. DLA700-81-B-1647, issued by the Defense Construction Supply Center, Defense Logistics Agency (DLA), for insecticide sprayers. Friend was not awarded the contract because the agency's refusal to waive first article testing resulted in that firm's bid being evaluated as second low. Friend protested, and on further review, DLA has concluded it erred in not waiving the first article testing requirement. We therefore sustain the protest as to that issue. Friend also argues that the awardee is a large business ineligible to compete for this procurement, which was set aside for small business labor surplus area concerns. We dismiss the protest as to the awardee's small business size status.

This procurement was for 28 insecticide sprayers manufactured in accordance with Military Specification MIL-S-28526A, dated March 28, 1973, and identified by National Stock Number (NSN) 3740-00-925-9598. These sprayers consist of a trailer which can be towed by a vehicle, a 200-gallon storage tank, and a gasoline engine-driven pump. The sprayers were to be a commercial product of the manufacturer and one unit was to be subjected to first article testing. The solicitation

advised bidders that first article testing may be waived if the bidder, under a prior contract, had tested and secured approval of a first article similar to the item procured under the present solicitation.

Five bids were received, of which only those of Friend and H.D. Hudson Manufacturing Company are relevant to this protest. Neither Friend nor Hudson submitted with its bid information requested by the solicitation which would substantiate a waiver of first article testing. First article testing was waived for Hudson, however, because DLA's records showed that firm had previously passed the first article test for a sprayer made to the military specification and bearing the NSN cited above. DLA had no record of testing and approving a first article of Friend's under these specifications. In a series of telephone calls made after bid opening, however, Friend brought to DLA's attention that it had previously supplied a similar item under contract DLA700-80-C-8082.

Contract -8082, which also was with the Defense Construction Supply Center, was to satisfy a need of the Navy for sprayers similar to those procured under the present solicitation. The specifications in Contract -8082 call for sprayers in accordance with MIL-S-28526A, but with a number of "deviations and options" described on three pages of that contract. Friend's first article test report under Contract -8082 was submitted to and approved by the Navy, not DLA.

After reviewing Contract -8082, DLA concluded that first article testing could not be waived for Friend, in view of the deviations from and options to the specifications which govern the present procurement. Friend's price, with first article testing, was \$88,454. Hudson's price was evaluated as \$87,846.08, which reflected the waiver of first article testing and the addition of a five percent factor because Hudson did not offer to perform in a labor surplus area. Since Hudson's bid was evaluated as low, it was awarded the contract on August 18, 1981. Had first article testing been waived for Friend, its price would have been reduced by \$2400 to \$86,054, which would have made it the low bidder.

Upon being informed of the award to Hudson, Friend protested to our Office. DLA re-examined the first article test report which Friend had submitted to the Navy under Contract -8082, and concluded that it had erred in not waiving first article testing for Friend. Since the agency has conceded error, the protest is sustained.

We are unable to offer Friend any remedial relief, however, because the contract has been performed. The contract was awarded on August 18, 1981 and Hudson was to complete delivery of the sprayers within 120 days thereafter, on December 16, 1981. As the agency itself notes in its report to our Office, it might have been feasible to terminate Hudson's contract for the convenience of the Government had the procuring activity acted more quickly once it determined that an erroneous award had been made. As it was, the procuring activity did not investigate the possibility of terminating Hudson's contract until two months after contract award at which time it was advised by Hudson that the company already had incurred the majority of the cost of performing the contract.

We think both Friend and DLA could have taken steps which may have avoided this improper award. The solicitation advised bidders seeking waiver of first article testing to submit with their bids the identity of the Government agency which had previously approved a first article test report on a similar item, copies of the approved test report, and a listing showing material differences, if any, between the item previously tested and the item to be supplied pursuant to this solicitation. Friend did not do this. What occurred here may have been avoided had Friend furnished with its bid copies of the first article test report approved by the Navy under Contract -8082 and an explanation as to why that contract's deviations from and options to the military specification were not material.

As for DLA, its initial decision not to waive first article testing for Friend appears to have been based on the fact that Contract -8082 was (1) for an item bearing no NSN, while the present procurement was for

the item identified by NSN 3740-00-925-9598 and (2) that Contract -8082 included deviations from and options to the military specification governing this item, DLA seems to have made no analysis as to the materiality of those deviations and options. Only after Friend protested to our Office did DLA analyze the first article test report approved by the Navy under Contract -8082 and conclude that the item successfully furnished under that contract was sufficiently similar to that being bought here that first article testing should have been waived for Friend.

Friend also alleges that Hudson is a large business ineligible for award under this small business set-aside. Under 15 U.S.C. § 637(b)(1976), the Small Business Administration (SBA) conclusively determines size status for Federal procurements, and any challenge to the size status of a small business must be made according to SBA procedures, rather than in the context of a bid protest. Logistical Support, Inc., B-203739, B-203782, September 15, 1981, 81-2 CPD 218. Therefore, the protest is dismissed as to this issue.

Harry R. Van Cleave

For the Comptroller General
of the United States